IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. ~~073374~~ 33809

STATE EX REL. THE TUCKER COUNTY SOLID WASTE AUTHORITY,

Petitioner,

v.

WEST VIRGINIA DIVISION OF LABOR,

Respondent.

THE WEST VIRGINIA DIVISION OF LABOR'S RESPONSE TO TUCKER COUNTY SOLID WASTE AUTHORITY'S PETITION FOR WRIT OF PROHIBITION AND RULE TO SHOW CAUSE

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COMES NOW the Respondent, the West Virginia Division of Labor (the "Division"), by counsel, Elizabeth G. Farber, Assistant Attorney General, and pursuant to Rule 14 (b) of the West Virginia Rules of Appellate Procedure, respectfully submits this Response to the Petition for Writ of Prohibition and to the Rule to Show Cause.

I. INTRODUCTION

Almost fifty years ago, the Legislature clearly and unambiguously set forth the policy of the Wages for Construction of Public Improvements Act (the "prevailing wage act" or the "prevailing wage statute"):

> It is hereby declared to be the policy of the State of West Virginia that a wage of no less than **the prevailing hourly rate of wages** for work of a similar character in the locality in this State in which the construction is performed, **shall be paid to all workmen employed by or on behalf of any public authority** engaged in the construction of public improvements.

W. Va. Code § 21-5A-2. (Emphasis added).

"Under West Virginia Code § 21-5A-2 (1961) (Repl. Vol. 1996), the provisions concerning prevailing wages can only be invoked when a construction project that constitutes a public improvement and which involves workers employed by or on behalf of a public authority is involved." Syl. Pt. 3, Affiliated Construction Trades Foundation v. University of West Virginia Bd. Of Trustees, 210 W.Va. 456, 458, 557 S.E.2d 863, 865 (2001) (the "ACT" case).

The construction of the new landfill area or cell undertaken by the Petitioner Tucker County Solid Waste Authority ("TCSWA") was clearly a public improvement.[1] It is undisputed that

[1] "The term 'public improvement,' as used in this article, shall include all buildings, roads, highways, bridges, streets, alleys, sewers, ditches, sewage disposal plants, waterworks, airports, and all other structures upon which construction may be let to contract by the State of West Virginia or any political subdivision thereof." W. Va. Code § 21-5A-1 (4).

TCSWA is a public authority and that the excavation work on the landfill cell was performed by workers employed by TCSWA. Exhibit 1. Accordingly, the threshold requirements necessary to invoke the provisions of the prevailing wage statute, as recognized by this Court in the ACT case, are met by the undisputed facts of this case.

In asking this Court to prohibit the Division from enforcing the prevailing wage statute, TCSWA argues that it is not required to pay prevailing wages to these workers because employees of a public authority are exempt under the prevailing wage act's definition of employee [2] and because the statute only applies to public improvement construction work that is let to contract.

Consistent with an opinion issued by the Attorney General in 1986, 62 W. Va. Op. Atty. Gen. No. 4, attached hereto as Exhibit 2, the Division asserts that the statutory employee exemption in W. Va. Code § 21-5A-1 (7) is limited to those "regular or temporary" workers already employed by a public authority before the construction of a public improvement is initiated, or to those workers needed to respond to an emergency. [3] The employee exemption does not cover new or additional

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[2] "The term 'employee' for the purposes of this article, shall not be construed to include such persons as are employed or hired by the public authority on a regular or temporary basis or engaged in making temporary or emergency repairs." W. Va. Code § 21-5A-1 (7).

[3] TCSWA has never asserted that the excavation work undertaken by the ten workers was for the purpose of responding to an emergency situation. "Emergency" is defined in the prevailing wage legislative rule as ". . . an unforeseen combination of circumstances which calls for immediate action, and is synonymous with crisis, pinch, strait and necessity." W. Va. Code St. R. §42-7-2.9. Any employee hired by a public authority to respond to an emergency would be temporarily exempt until the immediate crisis was alleviated.

Any circumstance developing over a period of time, such as a landfill reaching its capacity, is foreseeable and therefore is not an emergency for purposes of the prevailing wage statute.

workers hired by a public authority for the sole purpose of having them work on a public improvement project. According to the undisputed facts in the underlying administrative proceeding, TCSWA hired these workers on a temporary basis to work exclusively on the landfill excavation and when that work was completed, they were fired.

Although the Division is not charged with the enforcement of the bidding requirements of W. Va. Code § 5-22-1, and the applicability of the bidding requirements to this case was not raised in the administrative proceeding below, it nevertheless appears that the landfill project was subject to the provisions of W. Va. Code § 5-22-1. Under this statute, the State or any of its subdivisions (i.e., a public authority) must " . . . solicit competitive bids for every construction project exceeding twenty-five thousand dollars in total cost . . ." W. Va. Code § 5-22-1 (b).

The questions then are whether TCSWA should have solicited bids for the excavation work and, if so, can TCSWA avoid complying with the prevailing wage statute because it failed to comply with the government construction contracts statute. If TCSWA should have solicited bids and contracted for this work, and it clearly appears that it should have, this Court should not allow TCSWA's failure to properly comply with the bidding statute to serve as a reason for not having to comply with the prevailing wage statute because there was no contract involved. The failure to properly comply with one the requirements of one statute cannot be the justification for not having to comply with another.

II. STATEMENT OF FACTS

This case arises out of a prevailing wage investigation undertaken by the Division concerning wages paid by TCSWA to ten workers who were specifically hired to excavate a new landfill area and were then terminated when the excavation was completed. The workers were hired between

May and August, 2003, and most were terminated between November, 2003 and January, 2004. After its investigation, the Division determined that the ten employees were owed a combined total of $99,880.15 as the difference between what they were paid by TCSWA and what they should have been paid as prevailing wages. [4]

The question of whether bids on this project should have been solicited by TCSWA has not been raised in the administrative proceedings. However, based on documents TCSWA submitted to the Division, the total cost of the project at a minimum was $337,403.75, far in excess of the $25,000.00 statutory threshold in W. Va. Code § 5-22-1 (b). Attached hereto as Exhibit 3 are excerpted copies of TCSWA's payroll records showing final year-to-date actual gross wages paid to the ten workers, which total $45,758.75. The workers were paid by the hour and received no benefits. By comparison, according to the TCSWA's Employee Handbook, full-time employees are eligible to receive paid holidays, paid vacation, and paid sick leave, and to participate in PEIA's health insurance and life insurance programs and the PERS retirement program.

It is undisputed that TCSWA entered into a contract with Geo-Synthetics, Inc. to install a plastic liner in the new landfill area excavated by the ten workers. Exhibit 1, ¶ 15. A copy of Geo-Synthetics' "Proposal" to TCSWA, dated June 11, 2003, which totaled $291,645.00, is attached hereto as Exhibit 4. Page 2 of the proposal clearly specifies that the excavation work in preparation for the installation of the liner falls within the "Scope of Work to Be Performed By Others."

Upon the Division's finding that prevailing wages were owed, TCSWA advised the Division

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[4] The prevailing wage act provides for a like amount penalty equal to the wages owed for a violation of the statute. *See* W. Va. Code § 21-5A-9 (b). Accordingly, the actual prevailing wages owed plus a like amount penalty equal $199,760.30.

that it was contesting the case. Then-Commissioner James R. Lewis [5] appointed James W. McNeely to serve as the Hearing Examiner in a contested case hearing pursuant to W. Va. Code § 29A-5-4 of the State Administrative Procedures Act and W. Va. Code St. R. § 42-20-8.

On or about October 13, 2006, counsel for both parties thereafter submitted "Joint Stipulations of Fact," attached as Exhibit 1, to the Hearing Examiner and also simultaneously submitted proposed conclusions of law and memoranda of law in support of their respective conclusions of law. Both parties also submitted reply briefs on or about October 27, 2006. Hearing Examiner McNeely issued an order dated February 16, 2007, attached as Exhibit 5, directing the parties to further brief the issues presented in view of the prevailing wage statute's legislative and regulatory history. A copy of House Bill 255 and a copy of the March 7, 1961 Journal of the Senate entry concerning engrossed House Bill 255 were attached as exhibits to the order. Both parties thereafter submitted Supplemental Memoranda and Responses to the Hearing Examiner, who issued detailed "Preliminary Findings of Fact and Conclusions of Law and Order as to Further Proceedings" dated June 29, 2007, attached as Exhibit 6.

Contrary to TCSWA's assertion that the Hearing Examiner "concluded, as a matter of law, that the West Virginia Prevailing Wage Act applies to employees of a public authority who engage in construction of an improvement that was never let to contract" (Petition at 3), the Hearing Examiner recognized an "apparent conflict between the public policy purpose of the Act" and certain definitions that "appear to limit the application of the Act to public improvement let to contract." Exhibit 6, "Conclusions of Law" ¶ 12 at 5.

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[5] Commissioner Lewis resigned in January, 2007. The current Commissioner is David W. Mullins.

After reviewing the text of the act, the legislative history, and the federal Davis-Bacon Act (*id.*, ¶¶ 13-22 at 5-9), the Hearing Examiner concluded that the "Act has application not only to bid contracts, but as well to certain contracts of employment between public authorities and individuals" (*id.*, ¶ 17 at 7; *see also* ¶ 21 at 8), finding that such "a reading is necessary to give meaning to the stated purpose of W. Va. Code § 21-5A-2 after application of the employment exemptions stated in W. Va. Code § 21-5A-1 (7)." *Id.*, ¶ 22 at 9.

Finally, the Hearing Examiner cautioned that his conclusions of law were preliminary "in order to narrow the issues to be decided and give guidance to the parties as to further proceedings." *Id.*, ¶ 27 at 10. Finding that the factual record was not sufficiently developed concerning (1) the employment terms and conditions of the employees at issue, (2) whether there was a failure by the TCSWA to pay prevailing wages, or (3) whether the penalty provisions and the "honest mistake" exception in W. Va. Code § 21-5A-9 (b) are applicable, the Hearing Examiner directed the parties to confer with each other concerning what additional proceedings were necessary. *Id.*, "Order as to Further Proceedings," ¶¶2-3 at 11. TCSWA thereafter filed its writ of prohibition.

The Division asserts that the Hearing Examiner has not misconstrued or misapplied the prevailing wage statute or made any clear errors of law. As clearly stated in his June 29, 2007 order, all findings and conclusions were preliminary because the factual record was not complete.

III. STANDARD FOR ISSUING A WRIT OF PROHIBITION

It is well settled that a writ of "'[p]rohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for [a petition for appeal] or certiorari.' Syllabus Point 1, Crawford v. Taylor, 138 W.Va. 207, 75 S.E.2d 370 (1953)." Syl. Pt. 1,

State ex rel. Taylor v. Nibert, 220 W.Va. 129, 640 S.E.2d 192 (2006).

TCSWA has not alleged an absence of jurisdiction, but rather that the Division has exceeded its legitimate powers. In such instances ". . . the appellate court will review each case on its own particular facts to determine whether a remedy by appeal is both available and adequate, and only if the appellate court determines that the abuse of powers is so flagrant and violative of petitioner's rights as to make a remedy by appeal inadequate, will a writ of prohibition issue." Syl. Pt. 2, Woodall v. Laurita, 156 W.Va. 707, 195 S.E.2d 717 (1973).

TCSWA overlooks extreme nature of prohibition relief. This Court has long recognized that prohibition will not issue to prevent a simple abuse of discretion. There must be a demonstration of a clear-cut legal error to justify the issuance of a writ. State ex rel. Peacher v. Sencindiver, 160 W. Va. 314, 233 S.E.2d 425 (1977).

The applicable standard of review in considering whether to grant a writ of prohibition is:

> . . . (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Syllabus Point 4, State ex rel. Hoover v. Berger, 199 W.Va. 12, 483 S.E.2d 12 (1996).

TCSWA has other adequate means to obtain relief under the Administrative Procedures Act, W. Va. Code §§ 29A-5-4 and 29A-6-1, including an appeal as of right to circuit court of any final

order entered by the Commissioner, and further appeal to this Court of any order entered by a circuit court. Damage or prejudice, if any, sustained by TCSWA would therefore be correctable on appeal. For reasons that are set forth below, and contrary to TCSWA's assertions, the Division has not applied the prevailing wage statute in a manner that is clearly erroneous as a matter of law, but rather has applied the prevailing wage statute in a manner that is entirely consistent with 62 W. Va. Atty. Gen. Op. 4 and W. Va. Code § 5-22-1. The Division has not demonstrated any persistent disregard for either procedural or substantive law, but rather has demonstrated that its interpretation of the prevailing wage statute is entirely consistent with 62 W. Va. Atty. Gen. Op. 4 and W. Va. Code § 5-22-1. Finally, while the Division considers the challenge raised by TCSWA to be of critical importance, these matters have already been addressed by 62 W. Va. Atty. Gen. Op. 4, W. Va. Code § 5-22-1, and this Court in the ACT case

Therefore, considering the facts of this case in light of the legal standards which must be applied, it is obvious that TCSWA is not entitled to the writ it seeks.

IV. ARGUMENT

A. TCSWA Did Not Solicit Bids for the Excavation of the New Landfill Area in Apparent Violation of W. Va. Code § 5-22-1

It is undisputed that the excavation work performed by the ten workers was not let to contract. Exhibit 1, ¶ 14. If TCSWA was required to solicit bids on the landfill project pursuant to W. Va. Code § 5-22-1, and failed to do so, it cannot argue that because there was no contract for the excavation work, it was not required to pay prevailing wages to the ten workers it hired.

W. Va. Code § 5-22-1 provides that "[t]he state and its subdivisions shall, except as provided in this section, solicit competitive bids for every construction project exceeding twenty-five thousand

dollars in total cost . . ." W. Va. Code § 5-22-1 (b). From the documents provided to the Division by TCSWA, Exhibits 3 and 4, the total cost for the landfill project was at least $337,403.75, far in excess of the $25,000.00 statutory threshold.

Although there are four exceptions to the bidding requirements, none of them are applicable to the facts of this case. The first exception is for work ". . . performed on construction or repair projects by regular full-time employees . . ." W. Va. Code § 5-22-1 (d) (1). It is undisputed that the ten workers performing the excavation work were employed by TCSWA on a temporary basis and could not be considered "regular full-time employees." Exhibit 1, ¶ 12. The second exception is for work performed by students enrolled in a vocational education program when such work is a part of the training program. W. Va. Code § 5-22-1 (d) (2). It has never been suggested, and there is no evidence in the administrative record, that the ten workers were vocational education students. The third exception is when emergency repairs are necessary. W. Va. Code § 5-22-1 (d) (3). It has never been suggested, and there is no evidence in the administrative record, that the landfill project was due to an emergency of an immediate nature. The final exception is for work performed by volunteers. W. Va. Code § 5-22-1 (d) (4). Based on the payroll documents provided by TCSWA, Exhibit 3, it is clear that the excavation work was not performed by volunteers.

In 1986, the State Superintendent of Schools requested an opinion from the Attorney General regarding the scope of W. Va. Code § 5-22-1. 62 W. Va. Op. Atty. Gen. No. 4, Exhibit 2. Superintendent McNeel wanted to know if "'. . . it would be a violation of law for a county board to hire new employees to work on such [construction] projects, thereby avoiding the letting of bids' on 'construction or major renovation projects.'" *Id.* at 1. Finding it necessary to analyze both the prevailing wage statute and the bidding statute, the Attorney General concluded that, in view of the

prevailing wage act, the clear intent of the Legislature was that only those employees already employed on a full-time basis could work on a construction project in order for the project to fit within the bidding exemption of 5-22-1 (d) (1). Accordingly, the Attorney General advised Superintendent McNeel that

> 1. Unless the project falls within one of the specific exceptions contained in W. Va. Code § 5-22-1, capital construction, improvement or repair projects exceeding $25,000.00 in total cost must be submitted for public bidding.
>
> 2. Unless the public authority already has a sufficient number of available, currently employed full-time workers to devote to the project, the public authority must submit the capital construction project to bid if the cost will exceed $25,000.00.
>
> 3. The public authority may not hire new personnel to perform such capital improvements; nor may the public authority evade the law by hiring new personnel to do the work of regular employees and transfer existing employees to make such capital improvement.

Id. at 2.

Because the landfill project appears to have exceeded the § 5-22-1 (b) $25,000.00 threshold, pursuant to the opinion of the Attorney General, and as clearly set forth in both the "employee" exemption in the prevailing wage statute (W. Va. Code § 21-5A-1 (7)) and in the first exception to the bidding requirements (W. Va. Code § 5-22-1 (d) (1)), it would have perfectly permissible for TCSWA to use its currently employed staff to perform the excavation work on the landfill project if it had a sufficient number available without paying prevailing wages. However, it is not permissible to hire new workers to work on a public improvement project where the total cost of the project exceeds $25,000.00, or to hire new workers to do the work of current employees while transferring the current employees to work on a public improvement. The hiring of new workers

would be considered a circumvention or evasion of the law.

While recognizing that the factual record may be incomplete regarding TCSWA's apparent failure to comply with W. Va. Code § 5-22-1, if this Court nevertheless were to determine that TCSWA was required to solicit bids, TCSWA's argument that the prevailing wage statute only applies to construction work undertaken by contract would be moot because the project was improperly not let to contract. Accordingly, its petition for a writ of prohibition should be refused.

B. The Division Has Construed the Employee Exemption in the Prevailing Wage Act According to its Clearly Stated Legislative Purpose and in a Manner that Is Not Clearly Erroneous

TCSWA argues it is not required to pay prevailing wages to the ten workers hired to perform the excavation work on the landfill project because the workers are exempt under the definition of "employee."

The term "employee" as defined in the prevailing wage statute "shall not be construed to include such persons as are employed or hired by the public authority on a regular or temporary basis or engaged in making temporary or emergency repairs." W. Va. Code § 21-5A-1 (7). The statute does not define employment on a "temporary basis," although the legislative rule provides a rather generic definition of "temporary," meaning something ". . . lasting for a time only; existing or continuing for a limited time, not permanent." W. Va. Code St. R. § 42-7-2.10. Other state statutes do define employment on a temporary basis. Certain tax statutes specifically define a "temporary employee" as ". . . an employee performing services under a **contractual arrangement** with the employer of two years or less duration." W. Va. Code §§11-13M-2 (b) (19), 11-13N-2 (b) (18) and 11-130-2 (b) (18). (Emphasis added.). The workers compensation statute defines a "casual employer" as one who does not have more than three employees and when ". . . the **period of**

employment is temporary, intermittent and sporadic in nature and **does not exceed ten calendar days in any calendar quarter**." W. Va. Code § 23-2-1 (b) (4). (Emphasis added.).

Consistent with the statute's purpose clause, W. Va. Code § 21-5A-2 and the opinion issued by the Attorney General, 62 W. Va. Op. Atty. Gen. No. 4, the Division asserts that the statutory employee exemption in W. Va. Code § 21-5A-1 (7) is limited to those "regular or temporary" workers currently employed by a public authority before the construction of a public improvement is initiated. The exemption does not cover new or additional workers hired by a public authority for the sole purpose of having them work on a public improvement project.

"'Traditionally, when this Court is asked to resolve a question regarding a matter of statutory construction, we first consider the intent of the Legislature in enacting the subject provision. 'The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature. Syl. pt. 1, Smith v. State Workmen's Comp. Comm'r, 159 W.Va. 108, 219 S.E.2d 361 (1975).'" Newark Ins. Co. v. Brown, 218 W.Va. 346, 624 S.E.2d 783, 788 (2005). "A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." Syl. pt. 2, State v. Epperly, 135 W.Va. 877, 65 S.E.2d 488 (1951).

The intent of the Legislature in the prevailing wage act is clearly and unambiguously set forth in section two, entitled "Policy declared." There can be no question that the clear and express language in the policy clause extends its protection not only to workers who are "employed . . . on behalf of" a public authority, but also to those workers "**employed . . . by**" a public authority. W. Va. Code § 21-5A-2. *See also* Syl. Pt. 3, Affiliated Construction Trades Foundation, 210 W.Va. at 458, 557 S.E.2d at 865. (Emphasis added.).

This Court has further recognized the prevailing wage act's "unmistakable policy of this State to secure the payment of the prevailing wage rate for construction performed on public improvements 'by or on behalf of any public authority.'" *Id.* at 466, 873. Mindful of the ". . . laudatory policy advanced by the wage act . . ." in its analysis of whether the absence of a public authority's signature on a contract would be sufficient to defeat the application of the statute, the Court went "beyond the four corners of the statutory language." *Id.* at 471, 878. ". . . [T]o prohibit the clear intent of the statute from being violated. . . " the Court reasoned that the term ". . . 'public authority,' like the term 'public improvement,' cannot be used as a shield to prevent the wage act from operating when the public entity for whom the construction is being performed is not a party to a contract . . . ", and concluded that the absence of a public authority as a party to a contract was not in itself sufficient to defeat the application of the statute. *Id.* at 470-71, 877-78; *see also* Syl Pts. 5 and 6, *id.* at 459, 866.

TCSWA also argues that the language in the W. Va. Code §21-5A-2 policy is modified by the exemption in the definition of the term "employee" because the definition is more specific than the policy, and according to rules of statutory construction, a specific statutory section controls over a more general one. Petition at 13. "The general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled." Syl. Pt. 1, UMWA by Trumka v. Kingdon, 174 W.Va. 330, 331, 325 S.E.2d 120 (1984). In the Trumka analysis, however, the Court was especially mindful that the more specific statute was "completely consistent" with the legislative intent (". . . the result we have reached is completely consistent with the legislative intent as evidenced by another provision in the Coal Mine Health and Safety Act, W.Va.Code, 22-1-18."). *Id.* at 332, 122.

The Division's interpretation of the employee exemption in the prevailing wage statute is entirely consistent not only with the statute's clearly and unambiguously stated legislative purpose, but also with the 1986 opinion of the Attorney General and the exceptions to the bidding requirements of W. Va. Code § 5-22-1. The Division asserts that the statutory employee exemption in W. Va. Code § 21-5A-1 (7) is limited to those "regular or temporary" workers currently employed by a public authority before the construction of a public improvement is initiated. The exemption does not cover new or additional workers hired by a public authority for the sole purpose of having them work on a public improvement project. To interpret the exemption otherwise would permit public authorities to circumvent the statute in a manner that would directly contradict the statute's clear purpose. Accordingly, the Division's interpretation of the employee exemption cannot be clearly erroneous by any standard of proof.

It is well-settled that "'[i]nterpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous.' Syl. Pt. 4, Security National Bank & Trust Co. v. First W.Va. Bancorp., Inc., [166] W.Va. [775], 277 S.E.2d 613 (1981), *appeal dismissed*, 454 U.S. 1131, 102 S.Ct. 986, 71 L.Ed.2d 284 [(1982)]. Syl. Pt. 1, Dillon v. Bd. of Educ., 171 W.Va. 631, 301 S.E.2d 588 (1983)." Syl. Pt. 2, Hardy County Board of Education v. West Virginia Division of Labor, 191 W.Va. 251, 445 S.E.2d 192 (1994).

TCSWA hired ten new employees solely to work on the excavation of the landfill project and terminated them when their part of the project was completed. The ten workers were not regular employees of the Tucker County Solid Waste Authority, and did not enjoy the benefits received by regular employees. They were employed by a public authority to perform work on a public improvement project for the public's benefit, and they should have been paid prevailing wages for

their work.

C. The Division's Construction of the Prevailing Wage Act Under *Chevron* and *Appalachian Power* Implements the Clearly and Unambiguously Stated Legislative Purpose

"When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. . . [I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 104 S.Ct 2778, 2781-82, 467 U.S. 837, 842-43 (1984), attached as Exhibit 7.

This two-step Chevron analysis has been incorporated and applied in West Virginia in the case of Appalachian Power Co. v. State Tax Dept. of West Virginia, 195 W.Va. 573, 466 S.E.2d 424 (1995). Under the first step of a Chevron and Appalachian Power analysis, reviewing courts and the Division are required to "give effect to the unambiguously expressed intent of" the Legislature. Chevron, 104 S.Ct. at 2782, 467 U.S. at 843; *see also* Syl. Pts. 3 and 4, Appalachian Power, 195 W.Va. at 578. The legislative intent in the statute has been expressly set forth in policy clause, W. Va. Code § 21-5A-2, and has been recognized by this Court as an "unmistakable policy." Affiliated Construction Trades Foundation, 210 W. Va. at 466, 557 S.E.2d at 873. This Court also explicitly recognized that there is no requirement in the purpose clause that a contract must exist in order for the prevailing wage act to apply. *Id.* "Under West Virginia Code § 21-5A-2 (1961) (Repl. Vol.

1996), the provisions concerning prevailing wages can only be invoked when a construction project that constitutes a public improvement and which involves workers employed by or on behalf of a public authority is involved." Syl. Pt. 3, *Id.* at 459, 866.

At issue in this case is the definition of "employee" in the prevailing wage statute. If this Court finds that the definition is ambiguous, the second part of a Chevron and Appalachian Power analysis arises, and this Court must determine whether the Division's "answer is based on a permissible construction of the statute." Chevron, 104 S.Ct. at 2782, 467 U.S. at 843; *see also* Syl. Pt. 4, Appalachian Power, 195 W.Va. at 578. In this second stage of analysis, judicial review is "extremely limited . . . [and] involves a high degree of respect for the agency's role." Appalachian Power, 195 W.Va. at 588. Courts have "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer. . .unless [it is] arbitrary, capricious or manifestly contrary to the statute." Chevron, 104 S.Ct. at 2782, 467 U.S. at 844. "Where the language of the statute is of doubtful meaning or ambiguous, rules of construction may be resorted to and the construction of such statute by the person charged with the duty of executing the same is accorded great weight." Appalachian Power, 195 W.Va. at 587; State by Davis v. Hix, 141 W.Va. 385, 389, 90 S.E.2d 357, 359-60 (1955) (*citations omitted*).

The Division's interpretation of the employee exemption in the prevailing wage statute is entirely consistent not only with the statute's clearly and unambiguously stated legislative purpose, but also with the 1986 opinion of the Attorney General and the exceptions to the bidding requirements of W. Va. Code § 5-22-1. The Division asserts that the statutory employee exemption in W. Va. Code § 21-5A-1 (7) is limited to those "regular or temporary" workers currently employed

by a public authority before the construction of a public improvement is initiated. The exemption does not cover new or additional workers hired by a public authority for the sole purpose of having them work on a public improvement project. To interpret the exemption otherwise would permit public authorities to circumvent the statute in a manner that would directly contradict the statute's clear purpose. Accordingly, the Division's interpretation of the employee exemption cannot be arbitrary, capricious or manifestly contrary to statute.

D. The Division's Interpretation of the Prevailing Wage Statute Is Consistent with the Legislative History

Justice Cleckley has observed that "[l]egislative history and other tools of statutory construction are subject to many and varied criticisms, and the uncertainty about their value in general parallels the uncertainty about their value in relation to the *Chevron* doctrine." Appalachian Power Co.,195 W.Va. at 586.

The 1935 prevailing wage statute was substantially amended in 1961. Attached hereto for reference are the 1935 statute (Exhibit 8), H.B. 255 (Exhibit 9), an excerpt relating to H.B. 255 from the March 7, 1961 Journal of the Senate (Exhibit 10), an excerpt relating to H.B. 255 from the March 10, 1961 Journal of the Senate (Exhibit 11), an excerpt relating to H.B. 255 from the March 11, 1961 Journal of the Senate (Exhibit 12), and the 1961 statute (Exhibit 13).

Among the 1961 amendments, most notable for purposes of this case are as follows:

- The addition of the legislative purpose or policy clause which states that "[i]t is hereby declared to be the policy of the State of West Virginia that a wage of no less than the prevailing hourly rate of wages for work of a similar character in the locality in this State in which the construction is performed, shall be paid to all workmen employed by or on behalf of any public

authority engaged in the construction of public improvements." W. Va. Code § 21-5A-2.

- The addition of the definition of the term "employee" which states that "[t]he term 'employee,' for the purposes of this article, shall not be construed to include such persons as are employed or hired by the public authority on a regular or temporary basis or engaged in making temporary or emergency repairs." W. Va. Code § 21-5A-1 (7).

- Amendments to the definition of the term "construction" to include any public improvement "let to contract" and the provision excluding construction for "temporary or emergency repairs." [6] W. Va. Code § 21-5A-1 (2).

- An amendment to the term "public improvement" to encompass any structures "upon which construction may be let to contract." [7] W. Va. Code § 21-5A-1 (4).

The original purpose clause in H.B. 255, Exhibit 9 at 2, was offered for amendment by Senators Clarence Martin and Davis. Exhibit 11 at 1465-66 (beginning with "on page four, section two, line four..."). Their amendments were limited to inserting the words "in this state" after "locality," substituting the word "construction" instead of "work," and substituting the words "authority engaged in the construction of public improvements" instead of "body engaged in public works." *Id.* These amendments were adopted verbatim, Exhibit 12 at 1455, and were subsequently

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[6] "The term 'construction,' as used in this article, shall mean any construction, reconstruction, improvement, enlargement, painting, decorating, or repair of any public improvement let to contract. The term 'construction' shall not be construed to include temporary or emergency repairs." W. Va. Code § 21-5A-1 (2).

[7] "The term 'public improvement,' as used in this article, shall include all buildings, roads, highways, bridges, streets, alleys, sewers, ditches, sewage disposal plants, waterworks, airports, and all other structures upon which construction may be let to contract by the State of West Virginia or any political subdivision thereof." W. Va. Code § 21-5A-1 (4).

enacted as it appears in the current statute. Exhibit 13 at 1286. However, the amendments offered and subsequently adopted did not in any way concern the language that requires prevailing wages to be paid to all workmen "employed by" a public authority or contain any reference to a requirement that the statute only applies when a contract exists. Exhibit 11 at 1465-66; Exhibit 12 at 1455; Exhibit 13 at 1286.

Also on March 10, 1961, Senators Martin and Davis first offered the definition of "employee," which was entirely absent in H.B. 255. Exhibit 9 at 1-2; Exhibit 11 at 1465. However, the journal excerpts do not contain any further discussion concerning the definition, and it was subsequently adopted verbatim. Exhibit 12 at 1455, and signed into law, Exhibit 13 at 1286.

The matters raised by Senator Martin on March 7, 1961, Exhibit 10, largely concern his desire to exempt school boards from the provisions of the prevailing wage act, questions about the definition of locality, and numerous questions about how the minimum rate wage board would operate, the appeals process, the penalties for a violation, and the effective date of the amendments.

Given Senator Martin's detailed and meticulous criticisms of the language and scope of H.B. 255, Exhibit 11, in which he addressed the engrossed bill line by line, and his and Senator Davis's exhaustive amendments to the engrossed bill three days later, it is reasonable to conclude that if they had intended to exempt all employees of public authorities from the statute, they would have amended the purpose clause to include the requirement of a contract. Because Senator Martin's criticisms of the engrossed bill were so exhaustive and refined, it is hard to fathom that such an omission was simply an oversight.

In addition, if the senators had intended to offer a blanket exemption for all employees of a public authority, they would have offered the definition of "employee" to read simply that "an

employee, for purposes of this article, shall not be construed to include such persons as are employed or hired by the public authority." H.B. 255 did not have a definition of "employee." Exhibit 9. This definition was entirely their own. Exhibit 11 at 1465.

TCSWA asserts that Senator Tompos' remarks, Exhibit 10 at 1258, referring to the 1961 H.B. 255 as a "little Bacon-Davis act" demonstrates "that the legislative intent was to enact requirements for State contracts that mimicked those required by the federal government in the Davis Bacon Act." Petition at 22.

This assertion is not borne out by the language of the purpose clause in H.B.255 or the amendments to that section that were proposed by Senator Martin. Exhibit 9; Exhibit 11 at 1465-66. The original purpose clause in H.B. 255 stated that "[i]t is hereby declared to be the policy of the state of West Virginia that a wage of no less than the prevailing hourly rate of wages for work of a similar character in the locality in which the work is performed, shall be paid to all workmen employed by or on behalf of any public body engaged in public works." Exhibit 9 at 2. The amendments to this section proposed by Senator Martin were to strike "out the words 'body engaged in public works' and inserting in lieu thereof the following: 'authority engaged in the construction of public improvements.'" Exhibit 11 at 1465-66.

The Davis-Bacon Act originally stated that it was "[a]n Act relating to the rate of wages for laborers and mechanics employed on public buildings of the United States and District of Columbia by contractors or subcontractors . . ." 40 U.S.C.A.§ 276a, now codified at 40 U.S.C.A. §§ 3141 - 3144, 3146-3147. If Senators Martin and Tompos and the West Virginia Legislature wished to mirror the federal statute, they would have drafted a policy statement something like "[i]t is hereby declared to be the policy of the State of West Virginia that a wage of no less than the prevailing

hourly rate of wages for work of a similar character in the locality in this State in which the construction is performed, shall be paid to all workmen employed by any contractor or subcontractor engaged in the construction of a public improvement authorized by or on behalf of a public authority."

"'Absent explicatory legislative history for an ambiguous statute . . . this Court is obligated to consider the . . . overarching design of the statute.'" Appalachian Power Co., 95 W.Va. at 587 Because the legislative history does not resolve the ambiguity in construing the purpose clause of the prevailing wage statute in light of the exemption of employees of a public authority, "the statute is subject to reasonable construction by the administrative agency charged with the duty to carry out these statutory objectives." Appalachian Power, 195 W.Va. at 590.

Accordingly, in view of the statute's purpose, the Division has reasonably construed the employee exemption to include only currently employed workers, but not new regular or temporary workers hired for the sole purpose of performing work on a public improvement and then terminated when the work is completed.

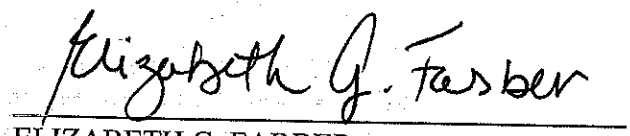
V. CONCLUSION

WHEREFORE, based upon the foregoing, the Respondent respectfully requests that this Court deny the Petition for Writ of Prohibition filed in this matter.

Respectfully submitted,

WEST VIRGINIA DIVISION OF LABOR
By counsel

DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I, Elizabeth G. Farber, Assistant Attorney General for the State of West Virginia, do hereby certify that a copy of "The West Virginia Division of Labor's Response to Tucker County Solid Waste Authority's Petition for Writ of Prohibition and Rule to Show Cause" was served on this 11th day of February, 2008, by depositing it in the United States mail, first class postage pre-paid addressed as follows:

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